Judicial Control of the Prosecutors' Activities in the Light of the ECHR

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The judicial control of the activities of prosecutors within criminal proceedings constitutes an important issue in every legal system. It is particularly important at the pre-trail stage of proceedings, when the prosecutor is responsible for many actions, and of lesser importance at the judicial stage of the proceedings, when the court takes over. However, the issue of judicial control of prosecutors' actions may warrant special attention once the European Public Prosecutor's Office (hereinafter the "EPPO") is established.[1] When it comes to prosecutorial actions, the EPPO will be subjected to the control of the national courts.[2] Therefore, it will be necessary to define the framework of the judicial control of the EPPO's activities executed by national courts.[3]

It seems obvious that in every legal system, with its specificities and traditions,[4] the legal framework regarding the judicial control of prosecutors' actions within criminal proceedings may vary. For this reason, it becomes necessary to search for a common ground, rules that might be useful and applicable in every legal system. In Europe, it may be enlightening to examine the standards related to the judicial control of prosecutorial activities set forth by the European Court of Human Rights. It will be particularly informative to find answers to the following three questions that will be considered in this article – who controls prosecutors, what is controlled, and what should be the control.

I. The Entity Performing Judicial Control

At the outset of the analysis, it should be noted that the nature of the judicial control of prosecutors' actions depends upon the position taken by the public prosecutors' office within the institutional framework in a given country and on the role they play within the criminal proceedings. In some EU Member States, the public prosecutors' office is an independent authority responsible for carrying out pre-trail proceedings and for prosecuting before the courts, and prosecutors enjoy a status of their own, e.g., in Poland. In contrast, in other Member States, prosecutors are a part of the corpus of magistrates, and their status is associated to the civil servants corps, but the most important decisions within the pre-trail proceedings are taken by other special magistrates or judges, not prosecutors, e.g., in France.

Therefore, the judicial control of prosecutors' actions may be performed within different legal regimes and at different levels. The first and most obvious level is the judicial control performed by a national judge. However, when the prosecutor enjoys a more independent status within the preliminary proceedings and is solely responsible for their outcome, national judicial control of his actions is more limited and takes place only incidentally with regard to specific actions, mainly the decision on pre-trial detention. In such an event, judicial control of the actions of the prosecutor may be performed by the European Court of Human Rights instead. Furthermore, however, within the framework of the ECHR, the ECtHR may also control the national courts controlling prosecutors, which adds another element to this already complex structure. From the point of view of the ECtHR, the judicial control executed by the national court may be called indirect, and the control exercised by the Court itself – direct.

Considering the direct level of control, i.e., the control carried out by the ECtHR itself, the Court has ruled on the subject on numerous occasions. For instance, it stated that the prosecutor's actions may violate Art. 6-1 ECHR when it declared a breach of the ECHR in a case when the actions of a prosecutor contributed to the prolongation of the proceedings up to the point of violating the reasonable time requirement.[5] The ECtHR also decided that a prosecutor may breach the principle of presumption of innocence, set forth in Art. 6-2 ECHR,[6] especially when formulating declarations as to the culpability of the accused in a context independent of the criminal proceedings themselves, i.e., by way of an interview to the national press.[7] However, the prosecutor has the right to take a position on the guilt of the accused within the framework of the proceed-

ings themselves, for instance when issuing a ruling on the applicant's request to dismiss the charges at the stage of the pre-trial investigation, over which he has full procedural control,[8] or in the indictment bill.[9]

Considering the national level of judicial control, i.e., the control over prosecutors' actions carried out by national judges, it must be noted that the case law of the ECtHR on this matter is not plentiful. In my view, this is due to several factors. Firstly, within the framework of Art. 6 ECHR, referring to the right to a fair trial – one of the most frequently applied provisions of the ECHR – the Court always emphasizes that it examines the fairness of the criminal proceedings in their entirety.[10] The "entirety of the proceedings" means that the pre-trail stage is taken under consideration by the Court too, but not exclusively. It is the judicial stage of proceedings that is more likely to bear on the assessment of the fairness of the proceedings. The course of the pre-trial stage of the proceedings is certainly evaluated and contributes to an assessment of the proceedings as a whole, but it rarely is subjected to a specific and separate evaluation by the Court.

Furthermore, the pre-trail stage of proceedings is covered by only some of the Convention's provisions, so the scope of the control performed by the ECtHR itself is limited.

Finally, the control of the ECtHR depends on the nature and modalities of the national model of public prosecutors' office and its role in the pre-trail stage of criminal proceedings. For instance, as mentioned above, in Poland, the preliminary proceedings (investigation and inquiry) is carried out or supervised by the prosecutor. The judicial authorities intervene only incidentally at the pre-trial stage of proceedings. The prosecutor in charge of the pre-trial proceedings is controlled by his superiors, and the actual judicial control of his actions at this stage of proceedings takes place only when the case is submitted to the court. For this reason, the ECtHR cannot control a judicial control which does not exist. It can, however, assess the prosecutor's actions on its own. Conversely, when the pre-trial stage is supervised by a judge, the Court may obviously take a position with regard to how this judge controls the actions of a prosecutor.

Coming back to the issue of who performs the judicial control at the national level, one should take note that Art. 5-3 of the ECHR mentions "a judge or other officer authorised by law to exercise judicial power," whereas Art. 5-4 refers to "a judge," and Art. 6-1 ECHR to "the tribunal." At the time of the adoption of the Convention, it was incontestable that the term "other officer authorised by law to exercise judicial power" covered prosecutors too.[11] Today, however, in the light of the more updated case law of the Court, it seems clear that a prosecutor may only be controlled by a judge, who enjoys independence towards both the parties to the proceedings and to the executive power and who is not a prosecuting party to the proceedings.[12]

II. The Scope of Judicial Control

Concerning the scope of judicial control, it should be emphasized that it starts from the beginning of the proceedings at the pre-trail stage, that is "from the moment a 'charge' comes into being, within the autonomous, substantive meaning to be given to that term."[13]

It seems unquestionable that the judicial control extends to the entirety of the proceedings at the pre-trail stage, especially at their *ad personam* phase. However, the question emerges as to what is the scope of the control when the proceedings are concluded before the case goes to court, especially when a prosecutor takes a decision not to prosecute. This issue is of special interest from the point of view of the future EPPO and its possible interactions with the national judges.

The ECtHR examined this question in several Romanian cases, in which the decision to discontinue the proceedings was taken by a prosecutor and was only submitted to the control of his superiors within the public prosecutors' office. It should be noted that the problem of judicial control was not in itself subjected to

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the control of the Court; it was one of the issues considered when evaluating proceedings carried out with regard to one particular individual.

At that time in Romanian law, a prosecutor could have decided to discontinue the criminal proceedings and instead inflict an administrative fine on the person. The ECtHR ruled that "the decision taken by the public prosecutors' office (…) deprived the applicant of the guarantees that he would have enjoyed had his case been submitted to the court."[14] One may therefore conclude that the ECtHR is favorable to judicial control of the decisions on discontinuing the proceedings as well.

Concerning the actions with regard to evidence, it should be noted that, in general, the ECtHR refrains from examining proof as such, as this obligation bears on the national authorities. The Court emphasizes that it finds itself responsible only for considering whether the proceedings in their entirety, the issues related to evidence included, were fair in the sense of Art. 6-1 ECHR. As stated in Barberà, Messegué and Jabardo v. Spain the Court said: "As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (…). The Court must, however, determine (…) whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 para. 1."[15]

In more recent judgments, however, the ECtHR does take a position on some types of evidence, in particular evidence collected in violation of Arts. 2 and 3 ECHR. The issue will be analyzed below.

Additionally, it should be emphasized that judicial control of the Court over the actions of a prosecutor may be based on conventional provisions that are not traditionally associated to the criminal proceedings. In doing so, within the framework of Art. 8 ECHR, the ECtHR insists on the necessity of judicial control of the surveillance. It might be too farfetched to call this requirement a standard yet; however, it seems that the Court deems it desirable. This position was taken in the case Klass and others v. Germany and confirmed in the case law that followed.[16]

III. The Efficacy of Judicial Control

The question of how to control – what should be the control of activities of prosecutors in the pre-trial stage of the proceedings – seems of particular importance, both from the point of view of internal practice and the interactions between the national judge and the EPPO. The answer to this question given by the ECtHR is, in my view, simple: control effectively.

The need for effective judicial control of the actions carried out by prosecutors is not expressly stated by the Court in its case law, or at least the Court does not call it this. However, I am of the opinion that this condition is indirectly implied in everything that the ECtHR has to say on the judicial control of prosecutors' actions. This requirement may, for instance, be observed in the judgments referring to Art. 5-3 and 5-4 of the ECHR.

It seems undisputable that the decision on placing a person in detention or on prolonging the detention must be taken by the judiciary, that is by the court. However, the prosecutor plays an important part in this process. Firstly, it is often the prosecutor who makes a request for detention or prolongation thereof. In some counties, like in Poland, a prosecutor is also authorized to release the person from detention if he no longer deems the detention necessary. Furthermore, in many legal systems, the prosecutor carries out the investigation (or supervises investigation carried out by other institutions) and therefore it is his inactivity that may contribute to the prolongation of proceedings and, in consequence, to the prolongation of detention.

Considering the issue of detention within the framework of pre-trail proceedings, the ECtHR takes the position that the national courts should not extend the detention on the basis of "the needs of the investigation," "risk of flight," "risk of collusion," or "possibility of repeating the offences." In other words, the courts may not be satisfied with the arguments submitted by the prosecutor. They have to assure themselves that the prolongation of the detention is really necessary. All the reasons justifying the detention are valid only if the competent national authorities – including the prosecutor – "displayed 'special diligence' in the conduct of the proceedings."[17] Therefore, it is through the obligation of verification of diligence that the Court introduces the requirement of efficacy of judicial control into the framework of pre-trial proceedings.

One can find the very same requirement in judgments referring to the rejection of certain types of proof, in particular evidence collected in violation of Arts. 2 and 3 ECHR. The ECtHR has quashed the use of such evidence in a series of cases: Örs and Others v. Turkey;[18] Levinţa v. Moldova;[19] Söylemez v. Turkey;[20] Harutyunyan v. Armenia 28, June 2007;[21] and, more recently confirmed in a judgment of the Grand Chamber, in Gräfen v. Germany, 1 June 2010.[22] I believe that, for the ECtHR, the rejection of such evidence constitutes a means of encouragement for the national judicial authorities to control the conduct of the pre-trial proceedings in a more effective manner. For, if the judges refused to validate evidence collected in violation of Art. 3 ECHR, the prosecutors would not authorize it for fear of losing the trial. However, the rejection of such evidence is at the same time a means to directly control the prosecutors – or, more generally, the national authorities in this regard.

The requirement of efficacy is probably most evidently expressed by the ECtHR in judgments referring to the positive procedural obligations bearing on the states. The doctrine of positive obligations, according to which the states are obliged to investigate the violations of Arts. 2 and 3 ECHR, was first formulated by the ECtHR in McCann and other v. the United Kingdom in 1995, but has been since confirmed and taken further in many other judgments.[23] The Court says very clearly that "the obligation to protect the right to life under this provision (art. 2), (…) requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."[24] The requirement of efficiency simultaneously includes the efficiency of the control and the efficiency of the investigative actions.

In states like Poland, where judicial control of the prosecutor's actions at the pre-trial stage of proceedings is limited, the ECtHR itself requires such efficacy from the prosecutor and controls him as there is no national judicial control at this stage. In this context, it recognized a breach of Art. 2 ECHR in Byrzykowski v. Poland of 2006 when a prosecutor had failed to investigate a case of death in an efficient manner. It is, of course, an example of a direct control performed by the Court itself for lack of national judicial control. It stems from this case law that the ECtHR requires the states to establish a system of justice of which a truly effective judicial control – if provided for in the national law – is an essential element. But if such control is not foreseen at the national level, the ECtHR reserves its right to exercise it itself.

The issue of efficacy of judicial control of prosecutors' actions seems of particular importance in the context of the establishment of the EPPO. Pursuant to Art. 36 of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, for the purpose of judicial review, when adopting procedural measures in the performance of its functions, the EPPO shall be considered a national authority. It stems from this provision that the EPPO will be subjected to the control of the national courts, on a general basis like the national public prosecutors' services – if any are foreseen in the national law. The question is, however, what would be the modalities of direct judicial control over the EPPO, that is the control performed by the ECtHR. It seems unquestionable that the ECtHR will be competent to control the EPPO after the EU's accession to the ECHR. However, before that happens, the question remains as to the direct control performed by the ECtHR. It might be questionable to argue that the EPPO would be subjected to the direct

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control of the ECtHR on the basis of Art. 36 of the proposed regulation. However, at the same time, it would put individuals in an unequal position should the EPPO not be subjected to the control of the Court unlike other prosecutors carrying out activities during the pre-trial stage of criminal proceedings. For this reason, one should advocate as rapid an accession of the EU to the ECHR as possible.

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1. See the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office of 2013, COM/2013/0534 final - 2013/0255 (APP).↩
2. Art. 36 of the proposal for a Council Regulation on the establishment of the EPPO.↩
3. See on this Z. Đurđević, *Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office*, (in) K. Ligeti (ed.) *Toward a Prosecutor for the European Union. Vol. 1. A Comparative Analysis*, Hart Publ. 2013, 986 ff.↩
4. See more in M. Delmas-Marty, J.R. Spencer (eds.) *European criminal procedures*, Cambridge University Press 2002; K. Ligeti (ed.) *Toward a Prosecutor for the European Union. Vol. 1. A Comparative Analysis*, Hart Publ. 2013.↩
5. Viezzer v. Italy, No. 12598/86, 19 Feb 1991, § 17: "the investigation was undoubtedly of some complexity owing to the nature of the facts to be established, but the applicant did nothing to slow it down and the Court cannot regard as "reasonable" in the instant case a lapse of time for the investigation stage alone which is already more than nine and a half years."↩
6. Conf. Daktaras v. Lithuania, 10 Oct 2000, No 42095/98: "the principle of the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (…), including prosecutors," drawing on an older judgment in the case Allenet de Ribemont v. France, No. 15175/89, 10 Feb 1995.↩
7. Butkevicius v. Lithuania, 26 March 2000, No. 48297/99, § 50: "The Court notes that in the present case the impugned statements were made by the Prosecutor General and the Chairman of the Seimas in a context independent of the criminal proceedings themselves, i.e. by way of an interview to the national press. The Court acknowledges that the fact that the applicant was an important political figure at the time of the alleged offence required the highest State officials, including the Prosecutor General and the Chairman of the Seimas, to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, it cannot agree with the Government's argument that this circumstance could justify any use of words chosen by the officials in their interviews with the press."↩
8. Daktaras v. Lithuania, 10 Oct 2000, No 42095/98, § 42.↩
9. Czajkowski v. Poland, 16 October 2007.↩
10. It is a line of the Court's case law on this issue. See, e.g., Helmers v. Sweden, No. 11826/85, 29 October 1991, § 39; Edwards v. the United Kingdom, No. 13071/87, 16 December 1992, § 34; Dombo-Beheer B.V. v. the Netherlands, 14448/88, 27 Oct 1993, Helle c. Finlande, 19 December 1997, 157/1996/776/977, § 53.↩
11. See Schiesser v. Switzerland, 7710/76, 4 Dec 1979.↩
12. See Huber v. Switzerland, 23 Oct 1990, more recent case law: Niedbała v. Poland, 27915/95, 4 June 2000; Moulin v. France, 37104/06, 23 November 2010. In Niedbała v. Poland, the ECtHR stated: "Before an 'officer' can be said to exercise 'judicial power' within the meaning of this provision, he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty (…). Thus, the 'officer' must be independent of the executive and of the parties. In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the 'officer' may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality are capable of appearing open to doubt (…). The 'officer' must hear the individual brought before him in person and review whether or not the detention is justified. If it is not justified, the 'officer' must have the power to make a binding order for the detainee's release" (§§ 48-49). It resulted in the change to the Polish law.↩
13. Conf. Deweer v. Belgium, 27 Feb 1980, § 42; Imbrioscia v. Swizerland, 24 Nov 1993, No. 13972/88, § 36.↩
14. "Cette ordonnance rendue par le parquet (...) a privé le requérant des garanties dont il aurait normalement joui s'il avait été renvoyé en jugement par un réquisitoire du parquet : la décision de non-lieu du procureur n'était susceptible, à l'époque, d'aucun contrôle par un organe juridictionnel indépendant et impartial (...)" (affaire Grecu v. Romania, 30 Nov 2006, No. 75101/01, § 56-58).↩
15. Barberà, Messegué and Jabardo v. Spain, No. 10590/83, 6 Dec 1988, § 68; confirmed in e.g. Kraska v. Switzerland, 19 April 1993, No 13942/88, § 30.↩
16. The ECtHR stated as follows: "The Court considers that, in a field [of surveillance] where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge" – Klass and other v. Germany, No. 5029/71, 6 Sept 1978, § 56.↩
17. Letellier v. France, 26 June 1991, No. 12369/86, § 35.↩
18. No. 46213/99, § 60, 20 June 2006.↩
19. No. 17332/03, §§ 101 and 104-05, 16 December 2008.↩
20. No. 46661/99, §§ 107 and 122-24, 21 September 2006.↩
21. "The Court observes, however, that different considerations apply to evidence recovered by a measure found to violate Article 3. (…) The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to `afford brutality the cloak of law´ – Harutyunyan v. Armenia, 28 June 2007, No 36549/03, § 63.↩
22. Gäfgen v. Germany, No. 22978/05, 1 June 2010.↩
23. See, generally, A. Mowbry, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hard Publ 2004; A. Ashworth, *Positive Obligations in Criminal Law*, Hart Publ 2013, ch. 8.↩
24. McCann and others v. the United Kingdom, No. 18984/91, 27 Sept 1995, § 161.↩

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